No. 75-1703

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In the Supreme Court of the United States

OCTOBER TERM, 1976

WRIGHT MOTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 1

Statute involved 2

Statement 2

Argument 4

Conclusion 10

CITATIONS

Cases:

Brooks v. *National Labor Relations Board*, 348 U.S. 96 8

Cerni Motor Sales, Inc., 201 NLRB 918 6

Cherrin Corporation v. *National Labor Relations Board*, 349 F. 2d 1001, certiorari denied, 382 U.S. 981 ..... 6, 7

Foam Rubber City No. 2 of Florida, Inc., 167 NLRB 623 ..... 5, 7

International Metal Products Company, 107 NLRB 65 ..... 5, 7

International Union, United A., A.& A. Imp. Wkrs. v. *National Labor Relations Board (Aero Corp.)*, 363 F. 2d 702, certiorari denied, 385 U.S. 973 8

Local Lodge No. 1424, IAM v. *National Labor Relations Board (Bryan Mfg. Co.)*, 362 U.S. 411 ..... 8, 9

Page

Cases (continued):

National Labor Relations Board v. *A. J. Tower Co.*, 329 U.S. 324 5

National Labor Relations Board v. *Basic Wire Products, Inc.*, 516 F. 2d 261 ..... 8, 9

National Labor Relations Board v. *Caravelle Wood Products, Inc. (Caravelle I)*, 466 F. 2d 675 6

National Labor Relations Board v. *Caravelle Wood Products, Inc. (Caravelle II)*, 504 F. 2d 1181 ..... 5, 6, 7

National Labor Relations Board v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517, certiorari denied, 389 U.S. 1041 5

National Labor Relations Board v. *McCready and Sons, Inc.*, 482 F. 2d 872 9

Orion Corporation v. *National Labor Relations Board*, 515 F. 2d 81 8

P. A. Mueller and Sons, Inc., 105 NLRB 552 5

Packard Motor Car Co. v. *National Labor Relations Board*, 330 U.S. 485 4-5

Pargas of Crescent City, Inc., 194 NLRB 616 6

Parisoff Drive-In Market, Inc., 201 NLRB 813 ...5, 6

Stanislaus Implement & Hardware Company, 92 NLRB 897 5

United Aircraft Corp. (Hamilton Standard Div.) v. *National Labor Relations Board*, 333 F. 2d 819, certiorari denied, 380 U.S. 910 5

Page

Cases (continued):

Uyeda v. *Brooks*, 365 F. 2d 326 7

Weyerhaeuser Company, 211 NLRB 1012 6

Wheeler-Van Label Co. v. *National Labor Relations Board*, 408 F. 2d 613, certiorari denied, 396 U.S. 834 5

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2

Section 2(3), 29 U.S.C. 152(3) 4

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4

Section 8(a)(5), 29 U.S.C. 158(a)(5) 4

Section 9(b), 29 U.S.C. 159(b) 4

Section 10(b), 29 U.S.C. 160(b) 2, 7, 8, 9

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 63-64) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 50-61) are reported at 216 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1976 (Pet. App. 65-66). The petition for a writ of certiorari was filed on May 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly sustained the Union's challenges to the eligibility of employees Wright and Groves to vote in the representation election.

2. Whether the Board's complaint, based on the employer's unlawful refusal to bargain some three months earlier, was time-barred by the National Labor Relations Act's six-month statute of limitations, Section 10(b), 29 U.S.C. 160(b).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

Petitioner is a closely held corporate automobile dealership in Evansville, Indiana. On March 27, 1973, the Union[1] filed a petition to represent a unit of petitioner's employees (Pet. App. 19). Pursuant to a Stipulation for Certification Upon Consent Election[2] the Board's Regional Director conducted a representation election on June 5, 1973, resulting in 14 votes cast for the Union, 12 against, and 3 ballots challenged by the Union (Pet. App. 20). The two challenges at issue here were directed against the ballots of Joe Wright and Steve Groves on grounds pertaining to their familial relationship with petitioner's owners and officers. With respect to these challenges the Regional Director's investigation revealed that, during the relevant period, Joe Wright was employed by petitioner as a general laborer working part-time after school and full-time during summer

[1]Local 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2]The stipulated unit is: "All mechanics, bodymen, painters, general laborers, partsmen and service writers employed by [petitioner] at its Evansville, Indiana establishment; but excluding all office clerical employees, dispatchers, all professional employees, all guards and supervisors as defined in the Act" (Pet. App. 19).

vacations.[3] Joe Wright's father is petitioner's president, George Wright, who owns between 51 and 52 percent of petitioner's stock and actively directs its operations. Joe Wright obtained his job by asking his father for it. He was 16 years of age, and living with his parents, at the time of the election.

Steve Groves used to work part-time for petitioner as a general laborer, but began working full-time shortly after the election. His mother, Eleanor Groves, is the sister of petitioner's president George Wright and owns about 28 percent of petitioner's stock. Steve's aunt, Abigail Whitehead, also a sister of George Wright, owns the remaining 20 percent of the stock. Steve's father, Clarence, is petitioner's vice-president. Clarence, however, works for petitioner as a service writer and is not effectively involved in directing petitioner's operations, though he does have the authority, which he shares with another officer, to sign corporate checks. At the time of the election, Steve Groves was 18 and living with his parents.

On these facts, the Board, affirming its Regional Director, sustained the challenges to the ballots of Wright and Groves because their interests were "more closely identified with their parents, the owners and principals of the company, than with their co-workers" (Pet. App. 22, 32). Leaving the challenge to the remaining ballot unresolved since it no longer affected the election results, the Board certified the Union (Pet. App. 32-33).[4] Petitioner refused

[3]We are lodging with the Clerk affidavits obtained by the Regional Director in the course of his investigation. These affidavits, although attached to petitioner's exceptions to the Regional Director's report (see Pet. App. 27), are not set forth in the appendix to the petition. The facts that follow are not contested and are set forth in these affidavits. They are also summarized at Pet. App. 21-22.

[4]The Board's Regional Director recommended that all of the Union's election objections be overruled, but noted that the investigation had

to bargain. The Board, rejecting petitioner's claim (Pet. App. 54) that the statute of limitations barred issuance of the complaint, found that the refusal violated Section 8(a)(5) and (1) of the Act and entered a bargaining order (Pet. App. 59-61).

The court of appeals enforced the Board's order (Pet. App. 63-64).

ARGUMENT

1. Petitioner contends (Pet. 6-9) that, since Wright and Groves were employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3),[5] they could not be excluded from the bargaining unit. There is no merit to this contention.

Section 9(b) of the Act, 29 U.S.C. 159(b), vests the Board with a broad discretion in determining bargaining units "to assure to employees the fullest freedom" in exercising their rights under the Act.[6] *Packard Motor Car Co.* v.

revealed evidence of additional misconduct by petitioner that was the subject of an unfair labor practice complaint issued previously (Board Case No. 25-CA-5626) (Pet. App. 22-24). In order to resolve this additional issue insofar as it related to the election, the Director consolidated the representation proceeding with that unfair labor practice case (Pet. App. 24). The Board found it unnecessary either to consolidate the two cases or to resolve the Union's election objections (Pet. App. 32, n. 1) since the certification of the Union had mooted issues relating to petitioner's election misconduct.

[5]Section 2(3) excludes from the definition of "employee" "any individual employed by his parent or spouse * * *." Wright and Groves, although related to petitioner's officers and stockholders, were, at least technically, employed by petitioner, a corporation.

[6]Section 9(b) provides: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *."

National Labor Relations Board, 330 U.S. 485, 491. See *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. The basic standard used by the Board, and approved by the courts, in grouping employees for bargaining purposes has been whether there is a "community of interest" regarding terms and conditions of employment. *E.g., Stanislaus Implement & Hardware Company*, 92 NLRB 897, 898; *Wheeler-Van Label Co.* v. *National Labor Relations Board*, 408 F. 2d 613, 616-617 (C.A. 2), certiorari denied, 396 U.S. 834. Frequently, the existence of a community of interest turns on the employees' job skills and duties. *United Aircraft Corp. (Hamilton Standard Div.)* v. *National Labor Relations Board*, 333 F. 2d 819 (C.A. 2), certiorari denied, 380 U.S. 910; *National Labor Relations Board* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517 (C.A. 7), certiorari denied, 389 U.S. 1041. However, the presence of common job characteristics may be outweighed by other factors.

Thus, the Board has long held that an employee's familial ties to company owners or managers may preclude a community of interest with fellow employees. *P. A. Mueller and Sons Inc.*, 105 NLRB 552; *International Metal Products Company*, 107 NLRB 65; *Foam Rubber City No. 2 of Florida, Inc.*, 167 NLRB 623. This policy is reasonable and therefore within the Board's broad discretion. In some cases, for example, the employee's "interests as a member of the governing family may well outweigh his interests as an employee of the corporation * * *," *Parisoff Drive-In Market, Inc.*, 201 NLRB 813, 814. Moreover, since the employee may be identified with management by his co-workers, his presence in a bargaining unit can inhibit the "fullest freedom" of others in the unit to exercise their rights under the Act. See *National Labor Relations Board* v. *Caravelle Wood Products, Inc. (Caravelle II)*, 504 F. 2d 1181, 1185 (C.A. 7).

Contrary to petitioner's suggestion, the Board did not simply apply a *per se* rule that an employee must be excluded whenever "his kinship to anyone with a substantial ownership interest can be shown" (Pet. 8). Rather, the Board's decision here reflects its current policy—inspired in part by the Seventh Circuit's decision in *National Labor Relations Board* v. *Caravelle Wood Products, Inc. (Caravelle I)*, 466 F. 2d 675, 679—of making a careful analysis in each case to ascertain whether, in spite of common job characteristics, exclusion is appropriate in light of all the circumstances pertaining to the familial bond between the employee and the company. See, *e.g.*, *Parisoff Drive-In Market, Inc., supra; Cerni Motor Sales, Inc.*, 201 NLRB 918; *Weyerhaeuser Company*, 211 NLRB 1012; *Pargas of Crescent City, Inc.*, 194 NLRB 616.

Thus, as the Board emphasized in its decision (Pet. App. 21-22), petitioner is a closely held corporation owned entirely by a brother and two sisters whose children are the challenged voters; two of petitioner's three officers are family members; George Wright, petitioner's president, majority stockholder, and principal director of operations, is the father of Joe Wright and uncle of Steve Groves; the mother of Steve Groves owns a substantial block of stock and his father is one of the three officers; and both challenged voters live at home with their parents. In these circumstances, the Board properly exercised its discretion in excluding Joe Wright and Steve Groves from the unit on the ground that they lacked a sufficient community of interest with the other employees. See *National Labor Relations Board* v. *Caravelle Wood Products, Inc. (Caravelle II), supra.*[7]

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[7] In *Cherrin Corporation* v. *National Labor Relations Board*, 349 F. 2d 1001, certiorari denied, 382 U.S. 981, the Sixth Circuit indicated a reluctance to exclude from a bargaining unit a woman related to the corporate owners absent evidence (which was found to exist) that she enjoyed a "special status" in terms of working conditions. 349 F. 2d at 1004-1005. See, similarly, *Uyeda* v. *Brooks*, 365 F. 2d 326 (C.A. 6). However, the court in *Cherrin* was following a then current Board rule requiring "special status" as well as family relationship. *International Metal Products Company, supra*, 107 NLRB at 67. The Board subsequently modified that policy in *Foam Rubber City No. 2 of Florida, Inc., supra* (excluding the children and spouses of individuals owning 50 percent or more of the corporate stock), and in later decisions, discussed above, which undertake a case-by-case analysis of all circumstances bearing on the existence of a community of interest. In view of these recent developments in Board law, there is no conflict between *Cherrin* and the decision by the court of appeals below. See *National Labor Relations Board* v. *Caravelle Wood Products, Inc. (Caravelle II), supra*, 504 F. 2d at 1185.

2. Petitioner also contends (Pet. 9-12) that the complaint was time-barred under Section 10(b) of the Act, 29 U.S.C. 160(b), which provides, in pertinent part: "* * * no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

The Union was certified on October 19, 1973 (Pet. App. 30-33). On January 30, 1974, the Union requested petitioner to bargain with it (Pet. App. 40, 42-43) and on February 1 petitioner refused (Pet. App. 44); the Union made another bargaining request on July 8, 1974 (Pet. App. 45), and petitioner refused on July 17 (Pet. App. 46-47). On October 2, 1974, the Union filed an unfair labor practice charge with the Board and on October 10, 1974, the General Counsel of the Board issued his complaint (Pet. App. 51). In arguing that the complaint was time-barred, petitioner points to the fact that the initial refusal to bargain in February 1974 antedated the unfair labor practice charge by more than six months. For Section 10(b) purposes, however, the relevant unfair labor practice was petitioner's admitted refusal to bargain in July 1974. Since the charge and complaint were filed in October, the Board properly concluded (Pet. App. 54) that Section 10(b) does not bar the instant proceedings.

A "certification, if based on a Board-conducted election, must be honored for a 'reasonable' period, ordinarily 'one year' in the absence of 'unusual circumstances'," *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98. See *Orion Corporation* v. *National Labor Relations Board*, 515 F. 2d 81, 84 (C.A. 7). Petitioner alleges no "unusual circumstances" that would alter its bargaining obligations as defined in *Brooks, supra*. Hence, it had a clear duty to honor, not only the February, but also the July bargaining request, which occurred within the certification year. The July refusal constituted a discrete, independent unfair labor practice neither related to, nor excused by, the earlier refusal. Therefore, the fact that petitioner may have committed a similar violation outside the Section 10(b) period is immaterial to the merits of the instant charge. *National Labor Relations Board* v. *Basic Wire Products, Inc.*, 516 F. 2d 261, 268 (C.A. 6). See *International Union, United A., A. & A. Imp. Wkrs.* v. *National Labor Relations Board (Aero Corp.)*, 363 F. 2d 702, 706-707 (C.A. D.C.), certiorari denied, 385 U.S. 973.

Local Lodge No. 1424, IAM v. *National Labor Relations Board (Bryan Mfg. Co.)*, 362 U.S. 411, on which petitioner relies (Pet. 11-12), is not to the contrary. There, a company and a union entered into a collective bargaining agreement containing a "union security" clause at a time when the union represented less than a majority of the employees. More than six months later, a charge was filed and a complaint issued alleging that continued enforcement of the agreement was an unfair labor practice. The Court held that the complaint was barred by Section 10(b) since (362 U.S. at 417):

> the entire foundation of the unfair labor charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign. [Footnote omitted.]

Here, by contrast, the finding of a violation requires no reference to petitioner's conduct outside the Section 10(b) period, although "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period," *Local Lodge No. 1424, IAM, supra*, 362 U.S. at 416. The certification in this case, which issued outside the Section 10(b) period, is not an unfair labor practice which "serves to cloak with illegality" (*id.* at 417) an otherwise lawful refusal to bargain. See *National Labor Relations Board* v. *Basic Wire Products, Inc., supra*, 516 F. 2d at 268. Rather, the July refusal to bargain itself is an unfair labor practice and, indeed, the charge here presumes the validity of the certification.[8]

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[8]The purpose of Section 10(b) was to protect alleged violators from stale claims and to give them an opportunity to prepare defenses. See *Local Lodge No. 1424, IAM, supra*, 362 U.S. at 417. Since petitioner's sole defense to the unfair labor practice charge was the invalidity of the certification, an issue that had already been litigated in the representation proceeding, petitioner cannot claim that the preparation of its defense was in any way impaired by the lapse of more than six months between its original refusal to bargain and the subsequent one, covered by the unfair labor practice charge. Petitioner, therefore, misplaces its reliance (Pet. 10) on *National Labor Relations Board* v. *McCready and Sons, Inc.*, 482 F. 2d 872 (C.A. 6). That case holds that "application of the continuing obligation doctrine to a charge of refusal to execute a contract [was] inconsistent with the purposes of §10(b)" (*id.* at 875), since preparation of the defense required reference to facts surrounding the contract negotiations, which occurred more than six months after the filing of the charge. See *National Labor Relations Board* v. *Basic Wire Products, Inc., supra*, 516 F. 2d at 267-268.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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